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IN THE

Supreme Court of the United States

October Term, 1954 No. 249

LESTER H. BURDICK,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

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IN THE

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Lester H. Burdick, petitioner, prays that a writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit, entered July 1, 1954, affirming petitioner's conviction of income tax evasion.

OPINIONS BELOW.

The opinion of the United States District Court for New Jersey is unreported. The opinion of the United States Court of Appeals for the Third Circuit has not been reported as yet. A copy of its opinion appears in the appendix at page 28.

JURISDICTION.

The jurisdiction of this Court is invoked under Act of June 25, 1948, C. 646, 62 Stat. 928, 28 U. S. C. A., Section 1241, (1). The order and judgment of the Court of Appeals for the Third Circuit was entered on July 1, 1954. A copy of its judgment appears in the Appendix at page 39.

The decision of the Court of Appeals in the instant case is squarely in conflict with decisions in at least three other circuits holding that where the prosecution attempts to establish an understatement of income of defendant by the net worth-expenditures method, the case should not be submitted to the jury if the starting point net worth is not definitely established.

In *Calderon v. United States*, 207 F. 2nd 377 (C. A. 9), Certiorari allowed, the Court held, inter alia; "The burden of proof is on the prosecution as to each pertinent starting item of the net worth statement to a reasonable certainty. Absent such a starting item as, say, Cash on Hand, the remainder of the statement proves nothing" * * * "The only other evidence showing the charged understatements consists of Calderon's verbal statements to the tax officials and to his bookkeeper. A fortiori since such written statements are extra-judicial, these verbal statements are. They

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cannot be the basis of a conviction absent, as here, some independent proof of the corpus delicti." *Spriggs v. United States* (C. A. 9), 198 F. 2nd 782; *United States v. Chapman* (C. A. 7), 168 F. 2nd 997, 1001, Certiorari denied, 335 U. S. 583.

Cases that are in agreement with the *Calderon* case are *Bryan v. United States*, 175 F. 2nd 223 (C. A. 5), *Demetree v. United States*, 207 F. 2nd 892 (C. A. 5), *Pollock v. United States*, 202 F. 2nd 281, 284 (C. A. 5), and *Fenwick v. United States*, 177 F. 2nd 488 (C. A. 7) .

Cases that are in conflict and disagreement with the instant case and the *Calderon* case are *Schuerman v. United States*, 174 F. 2nd 397 (C. A. 8), Certiorari denied, 338 U. S. 831, *Leeby v. United States*, 192 F. 2nd 331 (C. A. 8), *Bell v. United States*, 185 F. 2nd 302 (C. A. 4), Certiorari denied, 340 U. S. 930, *Brodella v. United States*, 184 F. 2nd 823, and *Graves v. United States*, 191 F. 2nd 579 (C. A. 10). These cases appear to hold that where some discrepancies appear between the defendant taxpayer's income tax return and his actual income or receipt of funds, the burden of proof shifts to the taxpayer to show that the discrepancies or additional receipts are not taxable income.

The several questions raised in this petition are of substantial importance, specifically, at least, in the interpretation, administration and enforcement of the Federal Internal Revenue statutes and income tax laws.

These questions as to the right of the government to use the net worth-expenditures method as a basis for income tax evasion prosecutions, and to the practice of the special agents of the Intelligence Unit and Revenue agents, when engaged in Criminal fraud investigations, in not giving taxpayers the benefit of their constitutional privileges by not warning them that whatever information they may give the agents might be used against them in a criminal proceeding, are arising quite frequently among the various District Trial Courts. As there are conflicts and disagreements and lack of uniformity in the lower Courts as to

them it is respectfully submitted that it is now necessary for a clarification of the issues by this Supreme Court.

Other reasons for granting the writ are those pertaining to the proper use and interpretation of the word "willfully" as used in the prosecuting statute, and the judicial determination relating to the conduct of the United States Attorney during the trial of the case.

It is contended by the petitioner that he did not have, and the government did not prove that he had, an evil motive or bad purpose in his actions. That the Court below should have approved a directed judgment of acquittal on this ground, alone. Further, that the Court below should have approved a request by petitioner for a mistrial and ordered a new trial due to the prejudicial conduct of the United States Attorney. That the trial Judge's admonitions to the jury were not sufficient and the evil influence upon the jury of these acts of misconduct was not removed by such judicial action as taken.

QUESTIONS PRESENTED FOR REVIEW.

1. In this instant case, an income tax evasion prosecution based on unexplained increases in net worth; (a) Must the government establish properly and sufficiently the taxpayer's basic net worth at the beginning of each of the taxable years involved to present an issue to the jury,? (b) Must the government prove each pertinent item of its net worth statement at the starting point of each of the years involved to a reasonable certainty,? and, is there independent third party evidence of a beginning net worth and yearly thereafter, required, and if so, was there such evidence presented by the government in this case, particularly as to cash currency on hand, real estate, life insurance and United States War Savings Bonds?

2. In an income tax evasion prosecution is the government required to prove the corpus delicti or some substantial portion thereof by independent evidence before the defendant's extra-judicial admissions may be introduced as evidence against him?

3. Was there sufficient evidence to support the Court below in its refusal of petitioner's motions for directed judgments of acquittal, particularly as to lack of willfulness?

4. Was there sufficient evidence to support the Court below in its refusal to grant defendant's motion to suppress the use as evidence against defendant the net worth statement, records and oral admissions given to and made to Special Agent Gerson and Internal Revenue Blackman at and between their first two conferences on November 6, 1951, and in January, 1952?

5. Should the Court below have granted petitioner's motions for withdrawal of a juror, which motions were based upon the United States Attorney's remarks and conduct?

STATUTES AND CONSTITUTIONAL AMENDMENTS INVOLVED.

Section 145 (b) of the Internal Revenue Code, 26 U. S. C. Section 145 (b).

This section provides: "Any person required under this chapter to collect, account for, and pay over any tax imposed by this Chapter, who willfully fails to collect or truthfully account for and pay over such tax, and any per-

son who wilfully attempts in any manner to evade or defeat any tax imposed by this Chapter or the payment thereof, shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, be fined not more than $10,000.00, or imprisoned for not more than five years, or both, together with the costs of prosecution.

The Fourth Amendment to the Constitution of the United States, provides as follows: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and particularly describing the place to be searched, and the persons and things to be seized."

The Fifth Amendment to the Constitution of the United States provides:

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

Section 3614 (a) of the Internal Revenue Code, 26 U. S. C. A. section 3614 provides:

> *"Examination of Books and Witnesses*
>
> (a) To determine liability of the taxpayer. The Commissioner, for the purpose of ascertaining the cor-

rectness of any return or for the purpose of making a return where none has been made, is authorized, by any officer or employee of the Bureau of Internal Revenue, including the field service, designated by him for that purpose, to examine any books, papers, records, or memoranda bearing upon the matters required to be included in the return, and may require the attendance of the person rendering the return or of any officer or employee of such person, or the attendance of any other person having knowledge in the matter required by law to be included in such return, with power to administer oaths to such person or persons."

Section 3761 (a) of the Internal Revenue Code, 26 U. S. C. A. section 3761 (a) provides:

"Compromises

(a) Authorization. The Commissioner, with the approval of the Secretary, or of the Under Secretary of the Treasury, or of an Assistant Secretary of the Treasury, may compromise any civil or criminal case arising under the internal revenue laws prior to reference to the Department of Justice for prosecution or defense: and the Attorney General may compromise any such case after reference to the Department of Justice for prosecution or defense."

STATEMENT OF THE CASE.

This is a petition for a Writ of Certiorari relating to a decision of the Court of Appeals for the Third Circuit which affirmed a judgment of the United States District Court for the District of New Jersey, entered on May 19, 1953, convicting petitioner of alleged violation of Section 145 (b) of the

Internal Revenue Code, 26 U. S. C. A. 145 (b) on all five counts of the indictment.

The indictment of petitioner was found by a Grand Jury of the United States District Court for New Jersey on or about September 11, 1952, and entered of record in the Court Records on September 17, 1952.

The government filed a Bill of Particulars indicating its case was based upon the net worth—expenditures method in arriving at the petitioner's correct taxable income.

The jury disagreed in the first trial of defendant and on April 20, 1953, the cause came on for a second trial before Honorable Phillip Forman, Chief District Judge and a jury at Camden, New Jersey. At the beginning of the trial petitioner's counsel moved for suppression of evidence procured by the government's agents from the petitioner in violation of his constitutional rights as provided by the Fourth and Fifth Amendments. The motion was ordered "Held" by the Court and the trial proceeded.

During the government's presentation of its case, the petitioner, through his attorney, moved, on various different occasions, for a mistrial, based upon the actions and statements of the United States Attorney. After admonishing the United States Attorney on these occasions, the Court refused to grant a mistrial.

Also, during the prosecution of the government's case, the Petitioner objected to the admission of the government agents' testimony and use of petitioner's net worth statement, and at the close of the government's case, petitioner moved again for a suppression of evidence and for a directed judgment of acquittal which were denied by the Court.

During the petitioner's presentation of his defense, his attorney, at least twice, moved for a mistrial, due to the United States Attorney's conduct, which was denied by the Court.

After the end of petitioner's case his attorney again moved for a suppression of evidence and for a directed

judgment of acquittal, which were denied by the Court. Petitioner's attorney also asked for a mistrial, due to the United States Attorney's remarks in his summation to the Jury, which were detrimental and prejudicial to petitioner, which was denied.

Petitioner was found guilty on all five counts and sentenced to jail for a year and a day on each of them, the sentences to run concurrently.

The petitioner during the period involved was employed as an executive clerk of the New Jersey State Senate when it was in Session and also did public relations work and sold radio advertising time. The latter activities were conducted from his home and by automobile. Petitioner had no accounting or tax experience.

Shortly before November 6, 1951, Special Agent Gerson of the Intelligence Unit, Bureau of Internal Revenue, United States Treasury Department, was assigned by his superior to make a criminal investigation of the income tax returns of petitioner for the taxable years 1946 to 1950, inclusive, based upon allegation of evasion of income tax. Special Agent Gerson arranged for an interview at the Internal Revenue Agents' office in Atlantic City, New Jersey, with petitioner for November 6, 1951, and notified him or Mrs. Burdick by telephone, that it was not necessary for petitioner to bring in any records at that meeting, it being just an informal meeting.

The petitioner appeared before Special Agent Gerson, as arranged, together with Mr. Leonard Willets (a former Internal Revenue Agent) who had assisted petitioner in making out his income tax returns. Special Agent Gerson introduced himself to them, stating he was a special agent attached to the Intelligence Unit in Philadelphia, and that petitioner could answer any questions he wanted, or he could refuse; that anything petitioner cared to give him would be voluntary. Petitioner offered to cooperate with the Bureau in any way he could. Special Agent Gerson did not tell him he was engaged in a criminal investigation or

that any information he gave him might be used against him in a criminal proceeding.

Petitioner had with him, at this meeting, his bank statements and cancelled checks for all the years involved and turned them over to Special Agent Gerson at his request. The cancelled checks indicated the persons, banks, companies, and corporations with whom he did business; his stock brokers, his and Mrs. Burdick's real estate and mortgage transactions; and his personal and business expenditures.

Special Agent Gerson questioned petitioner as to what records he kept and petitioner told him he didn't keep any formal records. That he did, however, keep memorandum and notes which he destroyed at the time he filed his return or shortly thereafter. Mr. Gerson then asked him for a net worth statement which would show his net worth as of January 1, 1946, and December 31, 1950. Petitioner, together with Mr. Willets, prepared such a statement and gave it to Mr. Gerson on November 21, 1951. The statement was headed "Lester H. Burdick" and at the bottom of the statement and above petitioner's signature was typed "The above statements reflect my net worth as of January 1, 1946 and December 31, 1950." It was sworn to by Petitioner. It was introduced in evidence by the government over objection as "Exhibit G-6" and the government based its case upon it.

There were only seven items of assets in the statement. One as to cash, two as to life insurance, and one each as to a savings account, securities and an auto. The items in dispute are as to cash currency on hand, life insurance in Mrs. Burdick's name, securities being United States War Savings Bonds in the name of Lester H. and Irene L. Burdick, and real estate in Mrs. Burdick's name.

There was an item of "cash" as of January 1, 1946 in the amount of $5,888.25, of which $1,888.25 was the balance of a bank account. The balance of $4,000.00 was what petitioner told the government agents in their examination of him he had at home and saved in prior years. The govern-

ment did not admit this cash of $4,000.00 at the time of indictment but did accept that the petitioner had it at the time stated by him, when the trial commenced. It did not present any independent evidence of what cash currency the petitioner had or could have had on hand as of January 1, 1946.

The listed item of life insurance which was in the name of Mrs. Burdick was included by the Agents because petitioner had listed it. The agents did not verify this item or the life insurance items of petitioner. They accepted his statements and at the trial no independent evidence of them was presented by the government.

The item of United States War Bonds was not listed by the petitioner in his net worth statement, although he did list securities at $3,000 for a starting point. The agents disallowed this item but charged petitioner with war savings bonds purchased in 1946, 1947 and 1948 and sold in 1948. The agents testified they did not know who purchased these bonds but they received a list from the United States Treasury Department in which they were listed in the names of Lester H. and Irene L. Burdick. Further that the bonds had been sold in 1948 at the Guarantee Trust Company, Atlantic City, being endorsed by Lester H. Burdick and the check for the proceeds being in petitioner's name, endorsed by him, and deposited in his bank account.

George Oberholtzer, a witness for petitioner, testified at the trial that he was an employee of the Post Office in Atlantic City and that Mrs. Burdick had purchased these bonds from him and had the bonds put in both names on his advice. The government did not present any other proof as to the purchase and ownership of these bonds.

The listed item of $1,750.00 for real estate in the starting point was a lot of land petitioner had purchased in 1944 and given his wife as a gift. The deed was in her name and so recorded. It was sold on July 3, 1948 for $5,500.00 and reported by petitioner and his wife in their 1948 joint income tax return.

The listed item of real estate, $22,500.00 in 1948 in the government's net worth is for the Burdick home purchased on June 15, 1948. The deed for this property is in the name of Irene L. Burdick and is so recorded. Petitioner stated it was paid for by the sale of his wife's war savings bonds and lot plus a $15,000 mortgage executed by both of them. Petitioner had also borrowed at this time $3,000.00 from a bank which funds were also available.

The government offered no independent evidence of the ownership of the life insurance, bonds and real estate but depended on petitioner's extra-judicial admissions for proof of same. The revenue agent stated he put them in petitioner's net worth as petitioner had included them in his net worth statement.

Petitioner testified he believed he was filing a joint net worth statement because Special Agent Gerson told him to "put everything in" and also because he and his wife had filed joint returns in 1948 when the lot was sold, and had filed joint returns in 1949 and 1950.

Petitioner included in his net worth statement as a liability as of December 31, 1950, a "loan payable" of $1,000. This being for money borrowed from a friend and which was lost on bets at a race track. The government agent disallowed the loan stating it was a gambling loss and not an allowable deduction.

Petitioner testified that he had informed the agents during his examination that his mother died in late 1946 and in going through her trunk in early 1947, he found $1,600.00 which he kept and used. Also that his wife had money of her own at home. The agents ignored these items and never questioned Mrs. Burdick or attempted to prove Mr. Burdick had not received any inheritances.

Petitioner had informed the government's agents, during their investigation, that he had received some monies from various persons which he had considered as gifts and did not, therefore, report them as taxable income. The agents did not investigate the correctness or falseness of these transactions or their true nature.

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ARGUMENT.

The government's net worth statement, including its starting point, was incorrect.

It is a well-established rule of federal criminal law that where the government's case rests on circumstantial evidence, such evidence may be the basis for a conviction only if the evidence is inconsistent with innocence and excludes every reasonable hypotheses except that of guilt. *Stubbs v. United States*, 2 F. 2nd 468 (C. A. 4).

With these determining points in mind, many of the appellate courts have held with uniformity that where the government relies on increase in net worth plus expenditures to prove unreported income, its case would fail if its basic premises, namely, that the net worth of the defendant at the beginning point of the period involved is not correct. *United States v. Chapman* (C. A. 7) 168 F. 2nd 997; *Bryan v. United States* (C. A. 5) 175 F. 2nd 223, 224, and *United States v. Fenwick* (C. A. 7) 177 F. 2nd 488.

To establish a correct beginning or starting point, the calculation must of course include all of the defendant's assets. It cannot include those of a third party, particularly that of his wife, who is not a party to the indictment.

It is contended that this is what the government has done to procure a conviction in the instant case. In its net worth starting point of December 31, 1945, it has included Mrs. Burdick's real estate and life insurance and in the following years it has included them in addition to her war savings bonds in the names of Lester H. and Irene L. Burdick (p. 263a).

It is submitted the government never proved, by competent evidence, that these items were defendant's and not his wife's assets. It used the extra-judicial admissions of petitioner in an attempt to present such proof. It did not

at the trial, present any independent third party proof that the real estate, life insurance (Acacia Life) and bonds did not belong to Mrs. Burdick. It relied solely on the net worth statement given its agents by the petitioner and which he considered was a joint statement of his and his wife's net worth (p. 263a).

It appears that the government shifted the whole burden of proof from the very beginning of petitioner's case to him to prove that he was innocent of the crime charged. It procured its proof of his other security holdings, bank accounts, mortgage and expenditures from his oral statements and cancelled checks which he gave the agents under a misapprehension that he was settling civilly any taxes he owed the government.

Petitioner also informed the agents that his wife had some money of her own with which she could have bought the bonds in question; that after his mother died in late 1946, he found (in January 1947) the sum of $1,600.00 in her trunk which he kept and used (pp. 412a-413a). Also in his net worth statement at the close of 1950, he included a loan payable of $1,000.00. Mr. Oberholtzer testified to the purchase of the bonds by Mrs. Burdick (pp. 377a-380a).

The agents did not give him credit for any of these items. They took what was favorable to the government and used it and denied petitioner the use of whatever was favorable to him. It is submitted the $1000.00 loan payable was a lawful liability and should have been allowed by the agents in a net worth case.

Although the government accepted the item of $4,000.00 cash currency petitioner stated he possessed (after it had denied it for indictment) (p. 279a); they did not present any independent evidence of it or of any amount he might have had. Neither did the agents present any independent proof that Mrs. Burdick did not have any money or assets. They did not question or attempt to question her although she was available for interview. They did not question Mrs. Burdick or petitioner's sister as to the $1,600.00 found in

his mother's trunks nor were any inheritance records produced showing petitioner's mother had or had not left an estate.

It is submitted that the government's agents did not definitely and accurately ascertain the taxpayer's starting net worth although the sources to do so were available, and as a result therefore they cannot use the extra-judicial admissions of the taxpayer to obtain a conviction against him. They have not proved the corpus delicti or any substantial portion of it. This view is supported by *Calderon v. United States*, 207 F. 2nd 377, certiorari allowed (C. A. 9), where the court stated—"The burden of proof is on the prosecution as to each pertinent starting item of the net worth statements to a reasonable certainty. Absent such a starting item as, say, cash on hand the remainder of the statement proves nothing * * *"

There was not sufficient evidence to support the Court below in its refusal of petitioner's motions for directed judgment of acquittal.

Several of the government's witnesses testified that they had given petitioner gifts or presents of money during its period involved, and that it was their intention to give the money as gifts or presents. Petitioner testified that he was told by his friends that those monies were given to him as gifts and presents. That he considered them as such; that he had not anticipated them or had done any services for them to consider the payments as compensation. He would have done these favors whether or not he was going to receive payments for them.

Also that he had gone to the office of the Internal Revenue in Atlantic City, explained at least two of the transactions were gifts and not reportable as taxable income. Further, that the government's written instructions indicated gifts were not taxable.

The persons making the payments were not under obligation, legal or otherwise, to pay Mr. Burdick any compensation or consideration of any kind. The payments were not made or intended to be made for services rendered or to be rendered or for any consideration given or to be given by any of them. There is entirely lacking in this case, the constraining force of any moral or legal duty as well as the incentive of anticipated benefit of any kind beyond the satisfaction which flows from a generous act. The acts of the donors were acts of spontaneous generosity.

It is contended that there was no consideration involved and Mr. Burdick was not in the position of a servant to the donors; he was not receiving "additional compensation" from them. That it was the intention of substantially all of them to make a gift or present to him. That the payments were made to show their good will and kindliness toward petitioner.

Mr. Burdick had no agreements to perform duties for the donors. If he had any agreements to perform services for compensation he reported such receipts as taxable income. It is submitted that these payments were gifts and is supported by the law in *Bogardus v. Commissions*, 302 U. S. 40-42. Further that it was the duty of the trial judge to decide as a matter of law that these payments were gifts and not taxable income. That it was not just a question of fact for the jury to decide.

It is also contended by petitioner that these sums given him were not taxable income and did not have to be reported.

The Court of Appeals in its opinion cites two examples of "gifts". One of these was the payments by Captain Hart. It is not maintained by the petitioner that the Hart payments were gifts. Under cross-examination, Captain Hart testified that he paid this money to Mr. Burdick, not as a gratuity but to entertain people in his behalf at Trenton. That he knew Mr. Burdick spent the money as the results proved it. From this testimony it appears petitioner is

entitled to more deductions for business entertainment (p. 112a).

As to the payments made to petitioner by Outdoor Advertising Association, Mr. Harvey, one of its officers, testified that there was no agreement with petitioner for payment of any specific amounts to him. That Mr. Burdick had no knowledge of any payment of money to him until he received it. As far as he was concerned and to the best of his knowledge. That the association would have a meeting when it was decided what it would give petitioner (p. 189a).

The Court also holds that there was evidence from which the jury could infer that petitioner sought to conceal some of his assets by having them carried in his wife's name.

It is respectfully submitted that the life insurance on Mrs. Burdick's life couldn't be in any one else's name; the lot was lawfully given to Mrs. Burdick by petitioner in 1944 before the period involved began; when the lot was sold in 1948, the capital gain on it was reported in their joint tax return for 1948; and the Osborne Avenue property was purchased with proceeds from the sale of the lot and war savings bonds (ownership in Mrs. Burdick having been described previously (pp. 428a-430a)) plus the mortgage money and a small amount of petitioner's money. The real estate and bonds were of public record.

As to the Prudential application containing the statement of annual income being about $10,000.00. This does not necessarily mean taxable income and is questionable competent testimony.

Petitioner submits he did not willfully evade payment of income taxes and no such evidence was produced by the government to show he had a specific intent involving bad purpose and evil motive. *Wardlaw v. United States*, 203 F. 2nd 884 (C. A. 5); *United States v. Murdock*, 290 U. S. 389; *Hargrove v. United States*, 67 F. 2nd 820; *Hughes v. United States*, 172 F. 2nd 986. There was an actual bona fide misconception of the law by petitioner as to gifts, if the payments are not found to be gifts.

There was not sufficient evidence to support the court below in its refusal to grant defendant's motion to suppress the use as evidence against defendant the net worth statement, records and oral admissions given to and made to Special Agent Gerson and Internal Revenue Agent Blackman at and between their first two conferences on November 6, 1951, and in January, 1952.

It is the contention of the defendant that the information the government agents got from him when he turned over his bank records, cancelled checks, brokerage records and miscellaneous records, as well as his oral admissions made to them during this period, as well as the net worth statement signed by him should not have been allowed in evidence by the trial Judge in his criminal case.

This contention is based upon two separate yet interrelated grounds. One is the constitutional guarantee in the Fourth Amendment to the Constitution of the United States against unlawful searches and seizures, and the second is the privilege against self incrimination contained in the Fifth Amendment.

Special Agent Gerson testified that the purpose of his investigation of the taxpayer was a criminal investigation; to investigate an alleged evasion of income tax. That it is his department (Intelligence Unit) that recommends prosecution of taxpayers for tax evasion. That all he told Mr. Burdick at his first meeting on November 6, 1951, was whatever he told or gave him was voluntary. That he did not tell him that anything he would give to him would be used against him in a criminal prosecution; also, that he did not warn him at their second meeting (pp. 58a-62a). Further that he did not advise defendant of his rights under the Fourth and Fifth Amendments to the United States. That he didn't know the Fourth and Fifth Amendments; not in their exact wording.

The defendant believed that the government was just

checking his returns and had gotten no warning from Special Agent Gerson or Agent Blackman that they were making a criminal investigation of his tax returns. That neither one warned him of his Constitutional Rights not to testify against himself. That on November 6, 1951, Mr. Gerson asked him several questions pertaining to his bank accounts, savings accounts, stocks, safe deposit box, real estate, insurance and as to where he got his money (pp. 418a-423a).

Inasmuch defendant was not warned of his constitutional rights he was misled by the government agents, particularly Special Agent Gerson, into turning over to him his various records for examination and giving him a net worth statement and other information as to his various financial and business transactions. He was under a misapprehension of the true facts of the case.

It is submitted that as defendant was misled into giving consent to the examination of his records; presenting a net worth statement, and giving other information to the agents, verbally, his action in so doing cannot be considered voluntary insofar as making available his records, net worth statement and transactions for the purpose of investigation to establish fraud for criminal investigation purposes. That they were obtained from him in violation of the Fourth Amendment and would be a violation of his rights under the Fifth Amendment. *Gouled vs. United States*, 225 U. S. 298, at page 305, states:

> "In practice the result is the same to one accused of crime, whether he be obliged to supply evidence against himself, or whether such evidence be obtained by an illegal search of his premises and seizure of his private papers. In either case he is the unwilling source of evidence, and the Fifth Amendment forbids that he shall be compelled to be a witness against himself in a criminal case."

To permit evidence to be obtained against a defendant by the means here employed (however innocently it may have

been done in this case) would be to encourage overzealous and less scrupulous officers and agents of law enforcement agencies to chip away rights, guaranteed by the constitution to defendants by trick and artifice, to do what could not be done in court proceedings, i. e., compel a defendant to testify against himself.

In *Shinyu Noro vs. United States,* 148 F. 2nd 696, the court stated inter alia.

> "in the case of the truth, even though unlawfully discovered, as evidence in the prosecution of a crime is not prohibited by constitution or other statutes, but it is a Federal Judicial policy not to allow agents and officers of the United States to break the law themselves and then use information so acquired to prosecute others."

In *Hanson vs. United States,* 186 F. 2nd 61, the Court, in calling attention to the defendant's contention of the violation of his constitutional rights under the Fourth and Fifth Amendments by failing to advise him of them stated, inter alia,

> "* * * at the time in question there is not evidence that a criminal prosecution was in contemplation. The government agent, in the performance of his duty, went to the defendant, advising him that he wished to check his income tax returns for the years in question. There is nothing to indicate that there was even any suspicion at that time that the defendant was guilty of a criminal offense. In these circumstances we think there was no occasion nor necessity for warning the defendant that any statements he might make or documents he might produce would be used against him in a criminal prosecution."

The principal factors referred to by the Court as being lacking and which by implication were necessary to sustain the plea of the Fifth Amendment are present in the instant

case. Here, at the time the defendant produced his papers, net worth statement and other records and gave information, criminal prosecution was contemplated, whereas in the *Hanson* case, there was nothing to indicate that there was any suspicion that the defendant was guilty of a criminal offense. Special Agent Gerson testified that the purpose of his investigation was for criminal prosecution, that he had information that the defendant may have evaded payment of income taxes.

It is submitted that the Court of Appeals for the 8th Circuit would have reached a conclusion that the defendant was entitled to a warning before the information could be said to have obtained from the defendant without doing violence to his privilege under the Fifth Amendment.

In *Guerrina vs. United States*, 112 Fed. Supp. 126 (U. S. D. C. E. D. of Pa., May 5, 1953), Judge Clary held that the defendant

> "* * * was induced under a misapprehension of the true facts and circumstances to give his consent to an examination under circumstances which rendered that consent to an examination ineffective and the search unreasonable and therefore unlawful His rights were further violated in that he was induced by reason of the same misunderstanding of the true facts and circumstances to give testimony against himself without proper warning. The evidence and information so obtained by the government may not be used against the defendant and the motion to suppress evidence and to return property shall be granted."

Also, *Pollock vs. United States*, 202 F. 2nd 281, C. A. 5.

The opinion of the Court of Appeals in the instant case cites the cases of *Montgomery v. United States*, 203 F. 2nd 887; *Powers v. United States*, 223 U. S. 303, 312, and *Wilson v. United States*, 162 U. S. 613, 623.

The *Montgomery* case appears to be in conflict with *Pol-*

lock v. United States, 202 F. 2nd 281-284, decided by the same court but a few months prior to Montgomery.

In the *Pollock* case the court stated, page 284 "* * * In the present case, the government agents made a rather thorough independent investigation; and then, by repeated examination of the taxpayer under oath, and also of his wife, after due warning of their constitutional rights, traced their financial history back for many years, established their net worth at the beginning of the questioned period and excluded every source of increase of net worth other than taxable income * * *"

It appears that the *Montgomery* and *Hanson* cases depend on the *Powers* and *Wilson* cases.

It is respectfully submitted that these recent cases have a misconception of the facts in the two earlier cases. In the *Wilson* and *Powers* cases the defendants each testified before a United States Commissioner shortly after the crimes were committed. They were not advised as to their constitutional privileges but they were advised as to the crimes they were charged with.

In none of these income tax cases was the taxpayer made aware of the charges against him. It is contended, therefore, that the reason why the court did not consider a constitutional warning necessary was that the defendants were aware of the criminal aspects of the matters having been told by the United States Commissioners of the charges against them.

In the *Wilson* case, page 616 in the statement of facts, it is related the Commissioner said, "that the statement was his (Wilson) statement as made and written down at the time; that he read the charges to Wilson and went on and examined him; and he answered the questions * * *."

In the *Powers* case, page 315, in the court's opinion it is stated "* * * It appears that Powers testified, being charged with illegal conduct concerning the distillation of spirits * * *."

Petitioner further contends that an examination of a

taxpayer under section 3614 (a) of the Internal Revenue Code is in the form of and similar to an inquisition by a grand jury and as he was a subject of such an examination he was actually a defendant in a criminal case and entitled to a warning as to his constitutional privileges. *United States v. Lawn*, 115 Fed. Supp. 674.

In *Falsone v. United States*, 207 F. 2nd 737 the Court stated "* * * The power granted to the commissioner of Internal Revenue by 26 U. S. C. A. No. 3614 is inquisitional in character and has been compared to the power vested in federal grand juries." *Bolich v. United States*, 67 F. 2nd 894, 895 (C. A. 2); *Brownson v. United States*, 32 F. 2nd 844, 848 (C. A. 8).

The Court below should have granted petitioner's motions for withdrawal of a juror, which motions were based upon the United States Attorney's remarks and conduct.

It is fundamental that the defendant in a criminal case is entitled to a fair trial, and intemperate, abusive and overzealous remarks by counsel for the government during the course of the trial, examination of witnesses, or the summation, are often sufficient ground per se to justify and demand the reversal of a judgment of conviction even though the trial Court is the only check upon any improper action of his. *Berger vs. United States*, 295 U. S. 78; and *Viereck vs. United States*, 318 U. S. 236, 248.

It is submitted that the United States Attorney in this case, overstepped the bounds of propriety and fairness which should characterize the conduct of such an officer in the prosecution of a criminal offense and unduly prejudiced the defendant to the jury; and that the advice by the Trial Judge to the jury to overlook such actions and remarks was not sufficient to remove such prejudice. Defendant's coun-

sel took objections to these various acts, moving for a mistrial, which were denied.

The record is replete with admonitions by the Trial Judge to the United States Attorney and motions for a withdrawal of a juror by defense counsel.

During Special Agent Gerson's testimony (pp. 68a-70a) defendant's counsel objected to Mr. Richman (United States Attorney) while sitting close to the jury prompting his assistant, Mr. Rutkowski; as a result the Court directed the United States Attorney to remain in his place at the counsel table and see that only one of the government attorneys registered objections. Mr. Richman asked the Court, "Are we going to have a lying down—" and the Court ordered him, "Don't provoke me."

During the presentation of some stipulations (pp. 94a-95a) the United States Attorney disagreed to presentation of certain offered stipulations by defense counsel; he refused as Mr. Reiners stated "viciously" and the Court ordered him to content himself, that he would have an opportunity to answer him. Mr. Richman began to say "that is rather—" when the Court said to him "never mind, no remarks. Don't mumble them either. I didn't hear what you said."

And following the same (pp. 96a and 97a) when Mr. Reiners, defense counsel, was objecting to putting into evidence the defendant's bank records in which the Court was protecting him, Mr. Richman remarked, "Do I understand that the defendant, in other words is not willing to have his bank records made known to the jury." The Court ordered the remark stricken out, but defense counsel moved for withdrawal of a juror as it being prejudicial to defendant. The Court stated to Mr. Richman that this case had been tried once before at great length and had entailed the government in great expense and admonished him not to risk the withdrawal of a juror. That he wasn't going to do it at that time because he did not think the defendant had been prejudiced. That his actions had kept on and he did not seem to know the cause of the mysterious mumblings.

During the cross-examination of Mr. Willits, defense counsel again called attention to the Court of the United States Attorney's mumblings (pp. 151a, 152a) and the Court directed him to deport himself as a lawyer should under the circumstances and not make any comment. Mr. Richman stated he did not make any comment to the Jury or anyone else. The Trial Judge stated that he hadn't said anything to the jury, but that he had made a comment, and if it wasn't directed to the jury or anybody else, then he made it to himself, and please try not to talk to himself and not to let it happen again.

During the testimony of Harry A. Sweeney (p. 175a), when Mr. Reiners objected to the United States Attorney's actions, Mr. Richman was directed by the Court to eliminate any further remarks after his rulings were made; and Mr. Richman replied, "We are getting at least to the point where I cannot say anything at all, but I will try."

During Mr. Harvey's testimony (p. 191a) Mr. Richman was directed by the Court please not to make a nuisance of himself. That if he was not going to make an objection, he should remain silent under severe penalty.

During interrogation of Mr. Grant, a government witness, as to defendant's purchase of a cadillac automobile, Mr. Richman, stated, "I am not going to quibble with this witness any longer. If counsel wants to conceal the fact ** *." This remark was ordered stricken out by the Court, but defense counsel moved again for withdrawal of a juror on account of prejudice to the defendant. The trial judge cautioned the jury that it should completely eradicate from its mind the remarks of the United States Attorney. The Court admonished Mr. Richman telling him that this was the third or fourth time that he had to deny a motion for a mistrial. That they now had four days and a great deal of preparation for trial, and on that account he didn't feel that a mistrial should be granted; that he had warned him that a repetition of this kind of remark will find its reaction in the granting of a motion for a mistrial when made by

defense counsel if he persisted in that kind of conduct (pp. 193a-195a). Mr. Richman replied that he did not have to sit there and take remarks that he was not conducting himself improperly because he was not. That the trifling objections being made to trifling remarks were an attempt to play up something out of nothing. That it was a deliberate plan and scheme to play up something out of nothing.

The Court told him that the remark that he had made was to imply that the defense counsel and the defendant wanted to conceal something. That it was uncalled for.

During the cross-examination of defendant, defense counsel made an objection and its United States Attorney exclaimed, "Correct me—he wants me instructed." Defense counsel again moved for withdrawal of a juror due to the conduct of the United States Attorney as it was prejudicial to the defendant. After a colloquy between the Court and Mr. Richman, he was directed to restrain himself and not persist in running the hazard of having to try the case all over again, which would be quite catastrophic.

Mr. Reiners called the Court's attention that Mr. Richman was not conducting himself properly in accordance with the rules of acceptable procedure. That he hadn't made any comment about it before, but sometimes during the course of his interrogation of witnesses, Mr. Richman had been standing back of the jury box, alongside the railing, close to Juror No. 7, and at other times he was wandering in the Court room when he was making an objection * * * that his objections being made were made in good faith and on well merited grounds.

Mr. Richman suggested to the Court that they were not made in good faith, but the Court ruled that they were.

Immediately thereafter, Mr. Richman made a comment saying that he disagreed with the Court. The Court again admonished him not to do those things; that he didn't want to hear any more from him, not even a small whisper (pp. 431a-436a).

During the United States Attorney's closing speech to the

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jury, Mr. Richman stated that defendant didn't care where the money he got from David Kent came from; that, "he didn't care whether it came from the Archbishop of Canterbury or 'Longie' Zwillman."

Defense counsel moved for a withdrawal of a juror. That the two characters mentioned never appear in the testimony. That "Longie Zwillman" is a character of an unsavory reputation; and that the remarks were definitely prejudicial to the defendant. That it inferred an association between defendant and a personality which was detrimental by inference and by reference. The motion was denied by the trial judge who believed that his cautioning to the jury was sufficient to remove any prejudice (pp. 450a-452a).

CONCLUSION.

It is respectfully submitted that in consideration of the foregoing reasons the petition for a writ of certiorari should be granted by this Honorable Court.

JOHN H. REINERS, JR.,
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Attorneys for Petitioner.

JOHN C. NOONAN,
Of Counsel.

Appendix

OPINION OF THE COURT.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT.

No. 11,135.

UNITED STATES OF AMERICA

vs.

LESTER H. BURDICK,
Appellant.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY.

Argued April 5, 1954.
Before GOODRICH, KALODNER and HASTIE,
Circuit Judges.

OPINION OF THE COURT.

(Filed July 1, 1954.)

By KALODNER, Circuit Judge.

This is an appeal from a conviction for income tax evasion under Section 145(b) of the Internal Revenue Code, 26 U. S. C. Section 145(b).[1]

The appeal is premised on (1) alleged insufficiency of the government's evidence; (2) denial by the trial judge of defendant's motion to suppress as evidence his statements, oral and written, and certain records given by him to government agents in the course of their investigation of his tax returns; and (3) alleged prejudicial conduct of government counsel.

A brief statement of the factual background is in order.

The defendant, Lester H. Burdick was tried on a five-count indictment charging him with filing false and fraudulent income tax returns for the years 1946 to 1950, inclusive.[2] He was found guilty on all five counts and sentenced to jail for a year and a day on each of them, the sentences to run concurrently.

The evidence at the trial established that during the period involved the defendant was employed as an executive clerk of the New Jersey State Senate when it was in session and also did public relations work and sold radio advertising time. The latter activities were conducted from his home.

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[1] This section provides:

"Any person required under this chapter to collect, account for, and pay over any tax imposed by this chapter, who willfully fails to collect or truthfully account for and pay over such tax, and any person who willfully attempts in any manner to evade or defeat any tax imposed by this chapter or the payment thereof, shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, be fined not more than $10,000, or imprisoned for not more than five years, or both, together with the costs of prosecution."

Defendant kept no books or records; he had only his cancelled checks and bank statements. During the course of an investigation by revenue agents prior to his indictment, defendant gave them a statement of his assets and liabilities as of January 1, 1946, and December 31, 1950, the opening and close of the taxable years here involved.

In computing defendant's alleged tax deficiency the government used what has come to be known as the net worth-expenditures method.[3] It based its case on the data obtained from the defendant and independent evidence of his personal expenditures; his receipt of substantial sums of money which he had not reported as income in his returns, because he treated them as non-taxable gifts; his various securities and real estate transactions.

The government presented a detailed analysis of defendant's bank records, brokerage accounts, real estate transactions, expenditures, unreported receipts and his own net worth statement previously referred to.

Revenue Agent Blackman, a government witness, submitted a calculation of defendant's net worth at the beginning of 1946 and for each of the taxable years involved. He testified that the defendant's expenditures for the five years under review were almost three times his reported net income for the period—$44,056.83 expenditures to $15,503.17 net income.[4]

At the trial the crux of the defense was that the government had placed an excessive valuation on listed assets, and moreover had erroneously included in such assets property which belonged to his wife; that it had not given effect to cash which he and his wife had kept on hand at home;[5] that his personal expenditures were less than those asserted by the government;[6] and that he had properly and in good faith treated unreported income as gifts. On the

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[2] Individually for the years 1946 and 1947, and jointly (for himself and his wife) for the years 1948, 1949 and 1950.

[3] For an excellent discussion of this method of proof see United States v. Caserta, 199 F. 2d 905 (3rd Cir. 1952); Montgomery v. United States, 203 F. 2d 887, 892 (5th Cir. 1953).

latter score it must be noted that defendant did not deny his receipt of the unreported sums which he treated as "gifts".

The trial judge in his charge correctly instructed the jury with respect to the issues presented by the testimony. He specifically charged the jury that there should be included in its determination of the defendant's net worth only such assets as belonged to him and that it was its function to determine the ownership of the various items of securities and real estate involved in the controversy. He further charged the jury it was its duty to fix a valuation of such assets as belonged to the defendant in the light of the testimony on that score and that it was for it to determine whether there had been any increase in defendant's net worth during the taxable years under review. He explicitly charged the jury on the issue of the defendant's expenditures. On the score of the unreported sums received by the defendant, the jury was charged it had to make a finding as to whether they were "gifts" or "taxable income", under stated applicable legal principles; [7] that in the event it found them to be taxable income, they must be eliminated from consideration in determining the guilt of the defendant "if his failure to report these items was due to an honest, even though mistaken opinion that these items were not subject to tax."

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[4] Government's calculation with respect to the items listed:

	Net Worth Increase	Expenditures	Gross Income Reported	Net Income Reported
1946	$3,518.78	$8,078.89	$4,610.00	$2,986.29
1947	8,446.46	8,822.77	5,116.78	2,376.70
1948	805.64	12,035.45	5,195.55	3,077.92
1949	3,716.35	7,451.01	4,365.33	2,174.17
1950	3,986.64	7,668.71	5,839.25	4,888.09

[5] Defendant testified that when his mother died in 1947, he had found $1600 in her trunk, which he kept. The defense also contended that Mrs. Burdick, the defendant's wife, had purchased out of cash which she had on hand, eighty-two $50 government bonds at a total cost of $3,075 in 1946-1947. The bonds were registered in the name of the defendant and Mrs. Burdick.

[6] The government estimated defendant's living expenses at $2,000 a year basing that estimate on the defendant's admission that he spent $20-25 a week for household expenses alone. Defendant contended that his total household and living expenses were slightly more than half of the government's $2,000 figure.

On review of the record we are of the opinion that the evidence amply sustained the jury's factual determination with respect to the issues of ownership of the controverted assets, their valuation, the increase in the defendant's net worth and the scope of his expenditures. The same is true with respect to the jury's finding that the unreported receipts were not "gifts" but income; that the defendant's failure to report them as income was not due "to an honest though mistaken opinion" as to their nature; and its ultimate finding that the defendant was guilty of willful evasion of the revenue statute.

There is no need to consider at length the defendant's contentions that the evidence failed to justify the jury's finding that the unreported receipts of approximately $14,500 from ten individuals were income and not gift.

As we held in Smith v. Manning, 189 F. 2d 345, 348 (1951), whether the receipts are gifts is primarily a question of fact to be resolved upon the peculiar circumstances of the case; [9] the mere fact that the payments were voluntary does not establish them as gifts; [9] if the payments were made without a donative intent and as compensation for services they constitute taxable income.[10] The term "gift" as used in the revenue statute "denotes the receipt of financial advantage gratuitously." [11]

The testimony fully established that defendant's unreported receipts, which he treated as "gifts" were compensation for services rendered or to be rendered, even though the payments were voluntarily made. They could, at the least, be broadly identified as "gratuities" or "tips" and it is well-settled that such receipts are not gifts, but taxable income. [12]

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[7] The trial court charged:

". . . In order to establish a gift, the circumstances surrounding the payment of money must disclose that it was the intent to bestow financial advantage gratuitously. If so, it is not subject to tax. A gift is nonetheless a gift because inspired by gratitude for past faithful service of the recipient; on the other hand, if the circumstances under which the payment was made disclose that it was for services rendered, or to be rendered, then it must be considered income subject to tax.

Two examples will suffice. Captain David T. Hart, a commercial fisherman and "public relations man" for the Fishermen and Food Workers, testified that he gave the defendant his personal checks for $2,000 in 1947 and $1,000 in 1948. Hart said he was reimbursed by the group he represented. In 1949 and 1950 the defendant was paid $2,000 annually directly by the group.[13]

The nature of Hart's payments to the defendant is illuminatingly illustrated by the following:

> "Q. What did you pay out your money for, Captain?
> "A. I gave Mr. Burdick this money for educating me to the ways of the Legislature because of the knowledge he had of the Legislature. Being a fisherman, I had none. I had never been to the State House until 1946. We felt that during that period, Mr. Burdick did us the service we wanted. He certainly educated me in the ways of the Legislature, and he knew the routine to be followed."

George M. Harvey, Jr., an officer of the Outdoor Advertising Association, testified that the Association "paid" the defendant $500 in each of the years 1946, 1947 and 1948, and $1,000 in both 1949 and 1950. These payments were treated by the defendant as "gifts" and not reported in his returns.

Harvey was asked:

> "Q. What did Mr. Burdick do for your association?
> "A. Well, he kept us in touch with any bills that were

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[8] Bogardus v. Commissioner, 302 U. S. 34 (1937); Commissioner v. Jacobson, 336 U. S. 28, 51 (1946).

[9] Old Colony Trust Company v. Commissioner, 279 U. S. 716, 730 (1929).

[10] Sportswear Hosiery Mills v. Commissioner, 129 F. 2d 376, 382 (3rd Cir. 1942).

[11] Helvering v. American Dental Co., 318 U. S. 322, 330 (1943).

[12] For an excellent discussion of "tips" and their taxable status see Roberts v. Commissioner, 176 F. 2d 221 (9th Cir. 1949).

[13] Defendant treated the money received from Hart in 1947 and 1948 as "gifts" and did not report it. Significantly he reported the money received from the Fishermen and Food Workers in 1949 and 1950 as income.

introduced in the Legislature that he thought might affect our business, and at times he sent us copies of the bills and kept us advised with the progress of those bills in the Legislature.

"Q. And those payments and that type of service represents the usual type of service rendered by Mr. Burdick over all the years in question, is that right?

"A. Yes."

Defendant vigorously urges that the evidence did not justify the jury's finding that he willfully attempted to defeat and evade the payment of taxes due.

This question, of course, is one of fact. United States v. Smith, 206 F. 2d 905 (3rd Cir. 1953). But the government need not adduce direct proof of intent. Norwitt v. United States, 195 F. 2d 127 (9th Cir. 1952), cert. denied 344 U. S. 817 (1952). It may be inferred from the surrounding circumstances, "* * * and the inference may be drawn from a combination of acts and circumstances, although each separate act and circumstance standing alone is inconclusive." Gaunt v. United States, 184 F. 2d 284, 290 (1st Cir. 1950), cert. denied 340 U. S. 917 (1951).

By way of illustration, the Supreme Court, in Spies v. United States, 317 U. S. 492 (1943), stated (page 499):

> "* * * we would think affirmative willful attempt may be inferred from conduct such as * * * destruction of books or records, concealment of assets or covering up sources of income, handling of one's affairs to avoid making the records usual in transactions of the kind, and any conduct, the likely effect of which would be to mislead or to conceal."

Here several items of evidence support an inference of willful attempt to defeat or evade the tax.

Special Agent Gerson testified that defendant told him that he kept certain memoranda and notes, but that they were always destroyed when his returns were filed or soon

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thereafter. Willits, who prepared all of defendant's returns for the years under prosecution, stated that the defendant never produced any books or other financial records for his examination, nor ever informed him of the various money payments, heretofore adverted to, which are now contended to be gifts. Although defendant testified that, in response to his inquiry, the local Internal Revenue Office in "1940-1943 or 1944" had advised him that these money payments were not taxable, he was unable to say whom he had consulted. Furthermore, there was evidence from which the jury could infer that defendant sought to conceal some of his assets by having them carried in his wife's name. Finally, when negotiating for a loan in 1948, defendant told an appraiser for the Prudential Insurance Company that his annual income was about $10,000, notwithstanding the fact that his *reported* gross income for none of the prosecution years exceeded $6,000.

Subjected to the test set out in the Spies case, we think that this evidence was clearly sufficient to establish a *willful* attempted evasion of the income tax.

* * * * * * * * *

We come now to defendant's second point—that the trial judge committed prejudicial error in denying his motion to suppress certain evidence. The latter included defendant's bank and brokerage records, a net worth statement prepared by his accountant, Willits, and oral admissions, all of which were given or made by the defendant to Special Agent Gerson of the Intelligence Unit, Internal Revenue Service, during the course of the government's pre-indictment investigation of defendant's financial affairs. The motion to suppress, was based upon the claim that when the above data and information was submitted to Special Agent Gerson, the latter allegedly failed to warn defendant that he did not have to testify against himself nor give any information that might be used against him in a criminal proceeding.

We are of the opinion that the trial judge did not err in denying the defendant's motion to suppress.

It is well-settled that it is "* * * not essential to the admissibility of his (defendant's) testimony that he should first have been warned that what he said might be used against him," providing that the defendant's statement "* * * was entirely voluntary and understandingly given. Such testimony cannot be excluded when subsequently offered at his trial." Powers v. United States, 223 U. S. 303, 312 (1912).[14]

Pertinent to and dispositive of the defendant's contention is a recent decision of the United States Court of Appeals for the Fifth Circuit, Montgomery v. United States, 203 F. 2d 887 (1953). It was there stated (page 892):

> "* * * In the present case, Special Agent Baskett testified that * * * he never at any time told the defendant that any document that was surrendered to him or his fellow agents would be used in either a civil or criminal prosecution against him. The defendant testified that, when Baskett and Government Agent Wilson first came to see him about his income tax matters, they told him that it was a routine check up, and that on each occasion he conferred with them, they told him it was purely a civil matter, that they would soon let him know how much taxes he owed, if any, and allow him to pay them, and that at no time was it intimated to him that there might be a criminal prosecution * * * We do not think the circumstances under which the statements of the defendant and of his wife, and the cancelled checks and documents, were obtained were sufficient of themselves to require that evidence be excluded on the ground of being involuntary as a matter of law * * * All of those circumstances were matters

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[14] As early as 1896, the Supreme Court in Wilson v. United States, 162 U. S. 613, 623 (1896) enunciated the rule that ". . . the true test of admissibility . . ." was whether the statements were ". . . made freely, voluntarily, and without compulsion or inducement of any sort."

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which went to the weight or credibility of the testimony thus obtained. (citing cases)"

To the same effect are United States v. Block, 88 F. 2d 618 (2d Cir. 1937), cert. denied 301 U. S. 690 (1937); United States v. Heitner, 149 F. 2d 105 (2d Cir. 1945), cert. denied sub nom, Cryne v. United States, 326 U. S. 727 (1945); and Chieftain Pontiac Corp. v. Julian, 209 F. 2d 657 (5th Cir. 1954).

In the instant case the uncontradicted testimony reveals that defendant was under no compulsion when he submitted the evidence in question to Special Agent Gerson. On direct examination Gerson described the circumstances surrounding his initial meeting with defendant as follows:

> "I called him on the telephone to make an appointment for him to come in and give me such information about his financial background that I needed for the purposes of this case. I believe on the phone I told him * * * that it would be an informal meeting, and made an appointment with him to come in on November 6, 1951. He brought with him Mr. Willits whom he introduced as his accountant. I introduced myself to both of them, told them that I was a representative of the Intelligence Unit in Philadelphia, and I told them that it would be an informal meeting, and he could answer any questions that he wanted, or he could refuse. I also told him that anything he cared to give me would be voluntary. He said that he would be glad to cooperate with the department in any way. He said he would give me or the department anything I thought was necessary. * * *"

When asked upon cross-examination whether he had warned defendant that anything said might be used against him in a criminal prosecution, Gerson replied: "I told him anything that he told me would be voluntary at that point."

* * * * * * * * *

Defendant's final contention is that the United States Attorney was guilty of prejudicial conduct during the course of the trial.

We are convinced, however, that though the government prosecuted with vigor, and was undoubtedly overzealous at times, no substantial rights of the defendant were affected. The record reveals that the trial court maintained an attitude of impartiality throughout the trial and was quick to admonish government counsel in the presence of the jury when the proprieties required it. Furthermore, in his charge to the jury, he stated:

> "* * * you, and you alone, are the sole judges of the facts in the case * * * you will not permit any invasion of your province to alone judge of the facts * * * I also call your attention that you should keep your minds uninfluenced by any extraneous remarks that may have been made by counsel in this case, particularly since the counsel table of the Government is traditionally close to the jury box. If you have heard any remarks or side remarks at Government's table uttered by the United States Attorney, you will exercise, I am sure, your good common sense and completely disregard them and not let them influence you in any way, in the case because only the evidence that you hear in the court room is the material on which you work and upon which you arrive at your verdict."

For the reasons stated the judgment of conviction and the sentence imposed thereon by the District Court will be affirmed.

A true Copy:
Teste:

Clerk of the United States Court
of Appeals for the Third Circuit.

BLEED THROUGH POOR COPY

JUDGMENT.

PRESENT:
GOODRICH, KALODNER and HASTIE, *Circuit Judges.*

This cause came on to be heard on the record from the United States District Court for the District of New Jersey and was argued by Counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of conviction and the sentence imposed thereon by the said District Court is affirmed.

Attest:
IDA O. CRESKOFF,
Clerk.

July 1, 1954.

(Received & Filed July 1, 1954
Ida O. Creskoff, Clerk.)